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VIA ELECTRONIC FILING

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

**Re: Ex Parte Notice
WC Docket No. 17-84**

Dear Ms. Dortch:

On November 8, 2017, Mike Tautphaeus (Joint Use Manager, Union Electric Company d/b/a Ameren Missouri), Karen Flewharty (Joint Use Manager, Oncor Electric Delivery Company LLC), and I met with each of the following members of the Commission staff separately:

- Ms. Amy Bender (Legal Advisor, Wireline to Commissioner O’Rielly);
- Mr. Jay Schwarz (Wireline Advisor to Chairman Pai); and
- Ms. Jamie Susskind (Chief of Staff and Wireline Advisor to Commissioner Carr).

On November 9, 2017, Mr. Tautphaeus, Ms. Flewharty, and I met with the following Commission staff separately:

- Mr. Claude Aiken (Legal Advisor, Wireline to Commissioner Clyburn); and
- Mr. Travis Litman (Chief of Staff and Senior Legal Advisor, Wireline and Public Safety, to Commissioner Rosenworcel).

During each of the above meetings, we shared Ameren and Oncor’s view that one-touch make-ready (“OTMR”) in the communications space is the most effective vehicle for the Commission to make large strides in speeding the deployment of broadband. However, we advocated that the Commission should not adopt a force-placed regulatory requirement allowing for OTMR in the power space, and that any OTMR in the power supply space should be voluntary and negotiated.

During each of those meetings, we also stressed that the Commission should not reduce the current 45-day survey period to 15 days. The benefit of any small

shortening of the access timeline would be vastly outweighed by the threat to safety and reliability because this 45-day period is the utilities' opportunity to properly engineer the proposed attachments (for the benefit of all stakeholders).

In our separate meetings with Ms. Bender and Mr. Litman, we urged that the Commission should continue to protect electric utilities' right to adopt standards that exceed the NESC. Enclosed as Attachment 1 are photographs of pole top antennas we showed to Ms. Bender and Mr. Litman as demonstratives to illustrate why many electric utilities have standards requiring greater separation between uppermost electric facilities and pole top antennas than the NESC.

In all of the above-referenced meetings, we also urged that the Commission continue to allow electric utilities to require advance notice of overloading. Such advance notice is essential in order for electric utilities to ensure that: (1) the additional load imposed by the overloading meets the electric utilities' standards for safety, reliability, and engineering, and (2) there is no existing violation of the electric utilities' standards or applicable codes on the pole that must be remedied prior to the proposed overloading. Ms. Flewharty stated that in 2016, Oncor received advance notice of overloading on 5,186 poles, 716 of which had pre-existing violations for failure to meet NESC requirements for clearance between communications attachments and power facilities. Overloading into a violation can pose a danger to the communications worker that is performing such overloading and risk compounding safety threats to workers and the public posed by such pre-existing violations.

Overloading is subject to the same safety, reliability and engineering standards as any other burden on a pole line (including but not limited to new attachments). The Commission and the courts have repeatedly recognized a utility's right to deny access to overloaders for reasons of insufficient capacity, safety or reliability. *See Southern Co. Services, Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002) ("And a utility can also deny access to overloaders for reasons of insufficient capacity, safety or reliability as described in the Act") (citing 47 U.S.C. § 224(f)(2) and *In the Matter of Amendment of the Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶ 74 (May 25, 2001)("Reconsideration Order")); *see also Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, 14 FCC Rcd. 11599, ¶ 26 (July 15, 1999) (prohibiting cable company from proceeding with overloading where make ready was required to accommodate proposed overloading).

As early as 1998, the Commission confirmed that Section 224(f) of the Pole Attachments Act, which allows electric utilities to deny access for reasons of

insufficient capacity, safety, reliability and generally applicable engineering concerns, is applicable to overloading:

To the extent that the overloading does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices. . . . Overloading has been in practice for many years. We believe utility pole owners' concerns are addressed by Section 224's assurance that pole owners receive a just and reasonable rate and that pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes.

In the Matter of Implementation of Section 703(E) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777, ¶ 64 (Feb. 6, 1998).

Thus, the notion advocated by some attaching entities that overloading is somehow exempted from engineering review is not just flawed as a matter of structural science, it is wrong on the law. And if utilities have the right to deny access under Section 224(f), the only way this right can be exercised is through advance notice of the proposed overloading.

Though the FCC has never adopted a formal rule requiring advance notice of overloading, the FCC and the courts have long contemplated that utilities and attaching entities might include an advance notice requirement in their contracts. *See Southern Co. Services*, 313 F.3d at 582 ("However, the FCC rules do not preclude pole owners from negotiating with pole users to require notice before overloading."); Reconsideration Order, ¶ 82 ("We clarify that it would be reasonable for a pole attachment agreement to require notice of third party overloading.").

Also instructive are the recent decisions of state public utility commissions which have confronted this issue head-on. As the Commission has observed:

[S]tate experience with regulation of pole attachments provides an invaluable opportunity for the Commission to observe what works and what does not work to achieve policy goals. State efforts to date on establishing fair access rules—including timelines—have been particularly instructive as the Commission attempts to balance the needs of communications companies to deploy vital network facilities with the needs of utility pole owners, including the need to protect safety of life and the reliability of their own critically important networks.

Implementation of Section 224 of the Act: A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, ¶ 7 (2011).

With respect to overlashing, to our knowledge, every state public utility commission to address this issue in the last 5 years has ratified or adopted some sort of advance notice requirement, if not an outright permitting requirement.

In 2016, the Arkansas Public Service Commission adopted new pole attachment rules which provide that “Requests to a Pole Owner for a Pole Attachment or Overlashing permit shall be in writing.” See Arkansas Public Service Commission Pole Attachment Rules,¹ Rule 2.02(a). Further, Rule 2.02(b) of Arkansas’ Pole Attachment Rules provides, “An Attaching Entity wishing to overlash facilities shall submit a written request to the Pole Owner identifying the size and type of facilities to be overlash, the size and type of facilities to be added, the poles over which such facilities will be overlash, and when such facilities will be overlash. . . .” And Rule 2.02(f) of the Pole Attachment Rules provides:

The Pole Owner shall approve, deny, or conditionally approve with Make-Ready Work provisions, **the request for** a Pole Attachment or **Overlashing** in writing as soon as practicable, but in no event later than: (1) **45 days after receipt of a complete permit request**, for requests including no more than 300 poles or 20 manholes; or (2) 60 days after receipt of a complete permit request, for requests greater than the preceding limits but less than 3,000 poles and 100 manholes.

(emphasis added).

Also in 2016, the Public Utilities Commission of Ohio (“PUCO”) approved Dayton Power & Light’s pole attachment tariff (over objections from the state cable television association) which required “advanced permission” for overlashing. *In the Matter of the Application of Dayton Power and Light Company to Amend Its Pole Attachment Tariff*, 2106 Ohio PUC LEXIS, ¶¶ 79-83 (September 7, 2016). The PUCO stated:

The Commission finds that DP&L’s voluntary proposed tariff language requiring advanced permission by DP&L for an attaching entity to overlash existing facilities is reasonable. . . . The Commission agrees with DP&L that overlashing an existing facility increases the load on a pole and that it is necessary to determine whether a pole can safely accommodate the additional load before the facility is overlash.

Id. at ¶ 83.

¹ Available at: http://www.apscservices.info/Rules/pole_attachment_rules.pdf.

In 2015, the Washington Utilities and Transportation Commission adopted a regulation requiring that attachers provide 15 days' advance notice of overlashing. *See* Washington Admin. Code § 480-54-030(11) ("the occupant must provide the owner with written notice fifteen business days prior to undertaking the overlashing...").

In 2014, the Louisiana Public Service Commission issued a General Order requiring advance notice of overlashing and requiring a pole owner wishing to deny such request to provide notice of same to the attacher within 15 days of receipt of the attacher's request to overlash. *See* Louisiana Public Service Commission, General Order, Docket No. R-26968,² Rule 7(a) ("An Attacher wishing to overlash facilities must provide a Pole Owner with reasonable notice of its intent to overlash facilities by filing a written request with the Pole Owner) and Rule 7(b) ("Where a Pole Owner does not wish to permit the attachment or overlashing of facilities, the Pole Owner must identify, in writing, the reasons for the denial within 15 days of receipt of the Attacher's written request").

In 2013, the Iowa Utilities Board adopted a requirement that attachers provide pole owners notice prior to overlashing:

Pole occupants shall provide notice to pole owners of proposed overlashing at least seven days prior to installation of the overlashing unless the pole occupant and pole owner have negotiated a different notification requirement.

Iowa Admin. Code r.199-25.4(2)(c)(3). The IUB reasoned in part that:

Overlashing of existing lines by a communications company may create situations that the pole owner will need to address prior to the overlashing being installed. The Board recognizes that many instances of overlashing will not require any action by the pole owner; however, in some instances the size of the overlashing may raise safety concerns.

...

The adopted provision that will require prior notice and an opportunity for the pole owner to determine if the overlashing raises safety concerns is consistent with the position taken by the FCC.

In Re: Pole Attachments Rule Making [199 IAC Chapter 27] and Amendment to 199 IAC 15.5(2), Docket No. RMU-2012-0002, 2013 Iowa PUC LEXIS 515, *19-20 (Iowa Utilities Bd. Dec. 2, 2013).

² Available at: <http://lpscstar.louisiana.gov/star/ViewFile.aspx?Id=2f4c383f-9b76-4b9f-bcd2-f7a5109def9c>.

In 2012, the Utah Public Service Commission approved a safe harbor pole attachment agreement, which provides as follows with respect to overloading:

With the exception of construction on existing slack spans or on existing messengers attached to Poles carrying voltages at or above 34.5 kV, Licensee may overload a single ninety-six (96) or fewer count fiber cable, or coaxial cable of equivalent diameter(s) and weight(s) without submitting an application. For these specific instances of overloading, Licensee will provide Pole Owner with maps of the proposed overload route and Pole numbers, ten (10) days prior to such overloading. Licensee agrees to correct any of Licensee's existing noncompliant facilities at the time of the overloading such that the facilities are made to comply with the NESC. Any other overloading requires Licensee to submit an application to Pole Owner and receive approval prior to installation.

Safe Harbor Pole Attachment Agreement of PACIFICORP d/b/a Rocky Mountain Power,³ approved in *In the Matter of Consolidated Applications of Rocky Mountain Power for Approval of Standard Reciprocal and Non-Reciprocal Pole Attachment Agreements*, Docket No. 10-035-97, Report and Order (Utah PSC, Nov. 21, 2012).⁴

Enclosed herewith as Attachment 2 are photographs we used as demonstratives in all of the above-referenced meetings as an example of an attacher overloading without notice into an existing violation (failure to meet NESC requirements for clearance over roadway) in Ameren's service territory in St. Louis. Enclosed as Attachment 3 are photographs of strand-mounted wireless equipment, which we used in all of the above-referenced meetings as a demonstrative to illustrate why electric utilities need advance notice of equipment deployed on the strand (even if it is not technically attached to the pole). Additionally, enclosed as Attachment 4 are photographs we showed to Mr. Schwartz, Ms. Susskind, Mr. Aiken, and Mr. Littman of a cable contractor in Oncor's system overloading into a pre-existing violation in the power supply space.

The positions and data we discussed in our meeting were consistent with the positions and data set forth in the initial comments and reply comments filed by Ameren and Oncor (along with AEP, Duke Energy, Entergy, Southern Company, and Tampa Electric) in this proceeding.

³ Available at: <https://pscdocs.utah.gov/electric/10docs/1003597/239851RevPoleAttachAgrmnt12-3-2012.pdf>.

⁴ Available at: <https://pscdocs.utah.gov/electric/10docs/1003597/2390361003597ro.pdf>.

This ex parte notification is being filed electronically in the above-referenced docket pursuant to section 1.1206(b) of the Commission's rules. Please let me know if you have any questions.

Very Truly Yours,
/s/ Robin F. Bromberg
Robin F. Bromberg

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Enclosures

ATTACHMENT 1



PHILLIPS
66
Wick Back Points

Regular **2.19** 9/10

Car Wash

DIESEL

PHILLIPS
66



ATTACHMENT 2



IMO'S

P I Z Z A

Sandwiches • Salads • Pa

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ATTACHMENT 3





ATTACHMENT 4

